United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-3077

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-3077

UNITED STATES OF AMERICA,

Petitioner,

v.

JON O. NEWMAN, United States District Judge,

Respondent.

On Petition For A Writ Of Mandamus

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

JACK GREENBERG
CHARLES STEPHEN RALSTON
LYNN WALKER
10 Columbus Circle
New York, New York 10019

Counsel for Amicus Curiae

INDEX

Table of Authorities

Statutes

Other Authorities

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 76-3077

UNITED STATES OF AMERICA,

Petitioner,

v.

JON O. NEWMAN, United States District Judge,

Respondent.

On Petition For A Writ Of Mandamus

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICUS CURIAE

Interest of Amicus [1/]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal

---

1/ Pursuant to Rule 29, Fed. R. App. Proc., consent to the filing of this brief has been obtained. The letters giving consent have been filed with the Clerk of the Court.

aid gratuitously to blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties and, it has participated as amicus curiae in the federal courts in cases involving many facets of the law.

Over a long period of time, LDF attorneys have handled many cases involving the exclusion of blacks from jury service.[2/] Of particular importance is the issue presented by this case, viz., the circumstances under which the use of peremptory challenges to strike black jurors can be reviewed and controlled.

ARGUMENT

The Action Of The District Court Was Consistent With The Federal Jury Selection Act And Was Not Contrary To The Decision In Swain v. Alabama.

In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court held that the Fourteenth Amendment was not violated by a

---

2/ E.g., Patton v. Mississippi, 332 U.S. 463 (1947); Swain v. Alabama, 380 U.S. 202 (1965); Sims v. Georgia, 389 U.S. 404 (1967); Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Alexander v. Louisiana, 405 U.S. 625 (1972).

prosecutor's using peremptory challenges to strike black jurors in a particular case. The Court went on to set out some general guidelines as to what had to be shown to establish an unconstitutional pattern of strikes. Since Swain, there have been attempts to meet the burden of proof established by the decision. See, e.g., United States v. Pearson, 448 F.2d 1207 (5th Cir. 1971); United States v. Corbitt, 368 F. Supp. 881 (E.D. Pa. 1973). None of these attempts was successful insofar as establishing a constitutional violation.

In the federal courts, however, there have been two cases, including the present one,[3/] where district judges have acted under their supervisory power to ensure justice even though a constitutional violation as such may not have been demonstrated. Amicus wishes to urge that such an action is fully within the discretion of a federal district judge and the exercise of that discretion should not be interfered with under the circumstances of this case.

The government argues at length in its petition for a writ of mandamus that Swain precludes the action of the court below. We will discuss, infra, why Judge Newman's order is not inconsistent with Swain. First, however, it must be noted that the government has not addressed itself to the question of the

---

3/ The other case is United States v. McDaniels, 379 F. Supp. 1243 (W.D. La. 1974), discussed, infra.

effect of the Jury and Service Selection Act of 1968 (28 U.S.C. § 1861, et seq.) on the issue before the Court.

Swain was solely involved with interpreting the Fourteenth Amendment and to what extent it controlled the use of peremptories. Indeed, Swain did not even discuss the implications of the Sixth Amendment's guarantee of a jury that reflects the community from which it was drawn, since the Court had not yet held that that amendment applied to the states. Compare, Williams v. Florida, 399 U.S. 78, 100 (1970).

The federal jury selection act goes substantially farther than the Constitution requires, since it imposes an affirmative duty to use jury selection methods that result in juries reflecting "a fair cross-section of the community." The statute also states that it is the policy of the United States "that all citizens shall have the opportunity to be considered for service on grand and petit juries," § 1861, and that "no citizen shall be excluded from service as a grand or petit juror . . . on account of race." 28 U.S.C. § 1862.

The 1968 Act was passed as a result of longstanding dissatisfaction with the methods of selecting juries in the federal courts, particularly with the use of the so-called "key-man" system. See, H. Rept. No. 1076 (90th Cong., 2nd Sess.), 1968, U.S. Code Cong. and Adm. News, p. 1792 et seq. As this Court has noted:

> The objective of the act is to secure a trial by a jury "selected at random from a fair cross section of the community" . . . from which no citizen is excluded because of race or color, 28 U.S.C. § 1862. United States v. Jenkins, 496 F.2d 57, 64 (2d Cir. 1974).

In addition to the general language of § 1862, § 28 U.S.C. § 1866(c) provides that:

> . . . no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: Provided, that any person summoned for jury service may be . . . (3) excluded upon peremptory challenge as provided by law . . . .

Thus, the act distinguishes between excluding individual persons by peremptory challenge, which is permissible, and excluding a class of persons, e.g., blacks, by any means, including peremptories. The statute can, therefore, be read to prohibit precisely the practice of the United States Attorney shown here.[4/]

4/ A review of the legislative history of the Jury Selection Act has not revealed anything that illuminates Congress' intent in enacting this provision. There was a fair amount of discussion of the use of peremptory challenges, but the main concerns were their use to eliminate persons who were not fully capable of serving as jurors but who had made it through the initial screening process, and the scope of voir dire. The Swain issue was not alluded to. See, e.g., Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, Hearings on S. 383, S. 384, S. 385, S. 386, S. 387, S. 989, S. 1319, March-July 1967, at pp. 52-55, 78-83, 101, 270-275.

In United States v. McDaniels, 379 F. Supp. 1243, 1249 (E.D. La. 1974), the district judge, while stating that the act was not directly concerned with the challenging process,[5/] correctly held that the language of § 1862 had to be considered in deciding a challenge to the use of peremptories to strike black jurors. As the court pointed out, "peremptory challenges bar jurors from service just as effectively as any other method." Ibid. The district judge had previously rejected a challenge to the composition of the jury list. United States v. McDaniels, 370 F. Supp. 298 (E.D. La. 1973), aff'd sub nom. United States v. Goff, 509 F.2d 825 (5th Cir. 1975), cert., denied 423 U.S. 857 (1975). In its prior opinion the court had noted that the question as to whether blacks were underrepresented on the jury was very close, but held that the degree of underrepresentation was not sufficiently large to require a reform of the method of jury selection. Similarly, this Court has held, in United States v. Jenkins, supra, that the disproportion between blacks in the overall list and in the population of the District of Connecticut was not sufficiently large to establish a violation of the Jury Selection Act.

In McDaniels, as here, the context of the prior jury challenge was an important factor leading the district judge to

---

5/ As discussed, supra, however, 28 U.S.C. § 1866(c) does encompass the use of peremptory challenges.

decide that some action had to be taken when the prosecutor struck all blacks on the venire through the use of peremptory challenges. The court did not find a Swain violation as such, holding that the rate of exclusion of blacks over a two-year period, although high, was not sufficiently high to meet the Swain burden. Nevertheless, the Jury Selection Act required the exercise of the district court's power to grant a new trial "in the interest of justice." (Fed. R. Crim. Proc., 33.)

In the present case, as in McDaniels, the district court was confronted with evidence that black citizens, over a period of two years, had been "excluded from [jury] service . . . on account of race." The result, in both instances, was that injuries during that period had not in fact been representative of the community. Amicus urges, therefore, that the court below was required to take the corrective action, and that the order entered was appropriate and well within his discretion.

Although we believe that the district court's decision should be upheld on the ground it was mandated by the Jury Selection Act, we would further urge that the United States misconstrues Swain and the general thrust of jury discrimination cases in its arguments that the action of the district court here was inconsistent with that decision. The problem in Swain was that the only evidence before the Court relating to the exercise of peremptory challenges was what had occurred in Swain itself. The Court had to resolve the tension between the well-established right to use

peremptory challenges in a particular case on the one hand, and the right of black defendants to be tried by properly selected juries and the right of black citizens to serve on juries on the other. Affecting the Court's decision was the general proposition, well-established by earlier cases,[6] that it was not sufficient to show that the particular jury did not have blacks on it, since there was no right to have that particular jury reflect exactly a cross-section of the community. Rather, the right was more general, viz., jury selection methods taken as a whole must not result in the exclusion of blacks from jury service, either because of their exclusion from the jury lists themselves, or because of a systematic exclusion from service of those on the lists. See, e.g., Alexander v. Louisiana, 405 U.S. 625 (1973).[7]

Swain dealt with these questions by establishing a general rule that a defendant would have to show a consistent pattern of the exercise of peremptories by the prosecution for the purpose of excluding blacks from jury service. Such a pattern could lead to an inference that the prosecutor purposely sought to exclude blacks from jury service in general. The district court here correctly noted that an inherent ambiguity would always exist in such cases, since it would be possible to conclude that in each particular case the prosecutor exercised peremptories not because

---

6/ See, the cases cited in Swain, 380 U.S. at 208.

7/ In Alexander, evidence was not introduced showing exclusion of blacks from grand jury service for a long period of time. Rather, the evidence went to the selection of the particular grand jury list

he wished to prevent blacks from jury service in general, but because, for example, in each he believed that black jurors might tend to be biased in favor of black defendants. Thus, the district court distinguished between an intent to exclude blacks and a motivation stemming from an animus against blacks, it was not necessary to show the latter in order to bring into play the supervisory power of the court.

We would urge that the decision of the court below is fully in accord with Swain. Judge Newman correctly required an inquiry into the use of peremptory challenges by the prosecutor over an appropriate period. A clear pattern of using peremptories to strike black jurors, particularly in cases involving black defendants, emerged. Recognizing that valid reasons might exist for striking jurors who happened to be black, the court required the United States Attorney to maintain records of the use of strikes in the future and gave him the option of explaining the strking of black jurors. In the present case, the court also provided limited, but appropriate, relief, viz., the return of the struck jurors to the panel. Otherwise, the court would have had no other option but to entertain a motion for a new trial after conviction, as was done in McDaniels.

7/ (Continued)

and of the particular grand jury that indicted petitioner. The evidence showed a progressive reduction in the number of blacks until the grand jury itself contained none.

The difficulty with the position of the United States in this case is that it does not address itself to the practical effect of allowing to go unchallenged the pattern of the use of peremptory challenges shown here. It is clear that over a two-year period, blacks have been excluded from jury service by the actions of the United States. Whatever the reasons for the prosecutor's consistent pattern of keeping blacks from jury service are, unless some remedial action is taken the result will be juries consistently underrepresentative of the community. Such a result would be a distortion of the general rule that a particular jury need not be represented, which only means that as long as <u>over the long run</u> blacks are adequately represented, the fact that in a particular case they are not does not establish a constitutional violation. To hold that it is sufficient that blacks be on the jury lists even though they never serve on juries or serve in numbers far below their representation in the community, would be to render the constitutional rule nugatory and would totally undermine the purpose of the Jury Selection Act.

CONCLUSION

For the foregoing reasons, the petition for writ of mandamus should be denied.

Respectfully submitted,

JACK GREENBERG
CHARLES STEPHEN RALSTON
LYNN WALKER
10 Columbus Circle
New York, New York 10019

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing Brief Amicus Curiae on counsel for the parties by depositing the same in the United States mail, postage prepaid, addressed as follows:

Andrew B. Bowman, Esq.
Chief Federal Public Defender
Office of the Federal Public Defender
District of Connecticut
770 Chapel Street
New Haven, Connecticut 06510

Joseph S. Davies, Jr., Esq.
Jerome M. Feit, Esq.
Appellate Section, Criminal Division
Department of Justice
Washington, D. C. 20530

Hon. Jon O. Newman
United States District Judge
141 Church Street
New Haven, Connecticut 06510

Peter C. Dorsey, Esq.
United States Attorney
P. O. Box 1824
New Haven, Connecticut 06507

Counsel for Amicus Curiae
December 15, 1976